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Supreme Court, U.S.
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No. 96-7151

In the Supreme Court of the United States
October Term 1996

Debra Faye Lewis, Petitioner,

v.

United States of America, Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED FOR REVIEW

- May the Assimilative Crimes Act be used to prosecute crimes in federal district court under a state statute in order to obtain a higher sentence, where the conduct underlying the prosecution is also regulated by a federal statute that would result in a lower sentence under the federal Sentencing Guidelines?

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INTEREST OF THE AMICUS CURIAE¹

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards full representation in its House of Delegates.

The NACDL was founded in 1958 to promote the study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice, and to ensure that federal statutes, such as the Assimilative Crimes Act, are construed and applied consistent with their language, Congressional purpose, and in accordance with due process.

¹ Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court. In compliance with Rule 37.6, counsel of record for the NADCL authored this entire brief. In addition, no person or entity other than the National Association of Criminal Defense Lawyers (NACDL) has made any monetary contribution to the preparation or submission of this brief.

ADDITIONAL CONSTITUTIONAL PROVISION:

Art. I, Sec. 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

SUMMARY OF ARGUMENT

The Court below erred in affirming the conviction for first degree murder under Louisiana law brought and tried in federal court under the Assimilative Crimes Act, 18 U.S.C. § 13; and the petitioner's sentence of life in prison without parole. The conduct that underlies the prosecution in this case, the killing of the petitioner's step-daughter on a federal military base, is regulated under the federal murder statute, 18 U.S.C. § 1111; and sentenced under the federal Sentencing Guidelines applied under 18 U.S.C. § 3553(b). The Court of Appeals for the Fifth Circuit correctly reasoned that the petitioner's indictment under the Assimilative Crimes Act was improper, because under the "precise acts" test articulated by this Court in *Williams v. United States*, 327 U.S. 711 (1946), the conduct of killing a human being was covered by a federal statute, second degree murder under 18 U.S.C. § 1111, and the Assimilative Crimes Act could not be used to charge the petitioner in federal district court with a different state offense for the same conduct.

The Court of Appeals, erred, however, in affirming the conviction and sentence, because it determined there was no prejudice from being tried on a "flawed" indictment. The sentence the petitioner received in this case, life in prison without parole, is the minimum sentence for both first and second degree murder under Louisiana

law. It is not, however, the mandated sentence for a conviction for second degree murder under federal law. In fact, a sentence of life in prison for a conviction of federal second degree murder is, under the sentencing guidelines for the petitioner, an erroneous and illegal sentence under 18 U.S.C. § 3553(b). The finding by the Fifth Circuit that petitioner suffered no prejudice is therefore erroneous.

ARGUMENT

I. The Fifth Circuit correctly concluded that under the "precise acts" test, the petitioners were erroneously charged and convicted in federal district court for murder under a Louisiana statute

The Fifth Circuit properly held that under the "precise acts" test followed by the majority of federal circuits,² the petitioner was improperly charged and convicted under the Assimilative Crimes Act, 18 U.S.C. § 13, with murder under a Louisiana statute.³ The Fifth Circuit correctly reasoned that the "precise act" with which the petitioner was charged, the killing of a human being, was conduct covered by the federal murder statute, 18 U.S.C. § 1111. The fact that Louisiana has added additional elements to its murder statute, in this case the killing of a child under the age of twelve, did not permit the district court to find that the conduct regulated by the two statutes was different, and therefore the

² The "majority view" was discussed by the Court of Appeals in *United States v. Lewis*, 92 F.3d 1371, 1374 n.4 (5th Cir. 1996). It contrasted the holdings of the Second, Sixth, Ninth, Tenth, and Eleventh Circuits with the minority "generic conduct" view of the Eighth Circuit.

³ La.Rev.Stat. § 14:30A(5).

petitioner was improperly charged and convicted in federal district court under the Assimilative Crimes Act for the murder of a child under Louisiana law.

This result comports not only with prior decisions of this Court, particularly *Williams v. United States*, 327 U.S. 711 (1946), but also the general nature of federalism and Congress's exclusive power under Art. I, sec. 1 of the Constitution to enact federal criminal legislation in federal enclaves. The precise conduct on a federal enclave was the killing of a human being. Congress has prohibited this precise conduct at 18 U.S.C. § 1111. Louisiana has made a separate determination on how to define and punish that precise conduct, and has added to its first degree murder statute its own separate element of the killing of a child under the age of twelve. Congress, however, has not made that further distinction, and only Congress must do so if the precise conduct of murder is prosecuted in a federal enclave. To hold otherwise would permit each individual state to preempt what is exclusively the concern of Congress, and to allow an individual district court to effectively legislate what statute to apply to the same conduct already considered by Congress.

This Court in *Williams* faced the almost identical situation as here, where petitioner was charged under the Assimilative Crimes Act with having sexual intercourse on the Colorado Indian Reservation in Arizona with a girl who was over sixteen but under eighteen. The crime that was assimilated was the then-applicable section 43-4901 of the Arizona Criminal Code, which expanded the definition of "statutory rape" to include sexual intercourse with a girl under the age of eighteen. The same conduct was prohibited by the then-applicable federal statutory

rape statute, 18 U.S.C. § 458, except that the girl had to be under the age of sixteen, not eighteen. This Court held that the Assimilative Crimes Act did not apply because (1) the precise acts upon which the conviction depended had been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" had been defined and prohibited by the Federal Criminal Code, and could not to be redefined and enlarged by the application of the Assimilative Crimes Act. 327 U.S. at 717.

The same situation exists here. The conduct that is criminalized by the Louisiana murder statute, the killing of a human being, is criminalized under 18 U.S.C. § 1111. The fact that Louisiana has expanded that conduct to define the killing of a child as an element of first degree murder, where such an element does not exist under the federal murder statute, does not permit the Assimilative Crimes Act to be used to redefine and enlarge the application of the federal murder statute. That is the prerogative solely of Congress under Art. I, Sec. 1 of the United States Constitution. This Court in *Williams* noted that

Arizona's definition of rape and the punishment that Arizona prescribes for its commission differ from those relating either to rape or carnal knowledge under the Federal Criminal Code. These differences well illustrate the confusing variations from the definition of a federal crime and from the provisions for its punishment which would have to be considered if indictments were permitted under the Assimilative Crimes

Act for every act committed within a federal enclave and which might come within a State's enlargement of the federal definition of the same offense.

327 U.S. at 717, n.11.

This is precisely the danger presented by the use of the Assimilative Crimes Act in this case. The common law crime of murder has been redefined by most jurisdictions and has specific elements that distinguish varying degrees and punishments by jurisdiction. To allow the Assimilative Crimes Act to become a tool by which the federal murder statute can be redefined would result in the same "confusing variations" that this Court expressly prohibited by the application of the "precise acts" test in *Williams*.

In a later decision of this Court construing the Assimilative Crimes Act, *United States v. Sharpnack*, 355 U.S. 286 (1958), this Court distinguished between a permissible act of Congress allowing those acts not regulated by Congress to be covered by subsequently revised state statutes, and the unconstitutional delegation of Congressional authority to the states to regulate conduct already regulated by Congress. This Court cited *Williams* with favor on the issue here, where a state law conflicts with a specific federal criminal statute. *Id.* at 293, n.9. The dissent by Justices Douglas and Black stated that allowing Congress to index the Assimilative Crimes Act to subsequently adopted state legislation was, in fact, an unconstitutional delegation of Congressional authority to the states. *Id.* at 296. The majority disagreed, but only as to those acts and conduct not already regulated by Congress, as the Court had previ-

ously held in *Williams*. To hold otherwise would be to allow states to redefine and rewrite conduct within a federal enclave that Congress had already considered and regulated by a specific federal criminal statute.

The brief of the respondent in its opposition to the grant of certiorari argues that the "precise conduct" in this case, the killing of a child, is different than that regulated by the federal murder statute and therefore properly brought under the Assimilative Crimes Act. This same argument was considered and rejected by the Fifth Circuit. The brief of the respondent in opposition makes a novel distinction between "primary" conduct regulated by the federal murder statute, and "the specific problem that is the subject of the state law sought to be assimilated." [Respondent's Brief in Opposition, pp.10-11.] The "specific problem" that was considered by the Louisiana legislature in its definition of the elements of first degree murder, was that "children . . . are in the category of persons needing special protection" [Respondent's Brief in Opposition, p. 11.] Congress, however, *did* consider this factor, but applied it differently. Under U.S.S.G. § 3A1.1, a sentence in a criminal case, including that of second degree murder, must be aggravated by two offense levels if the district court finds that

the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct.

Age of the victim is precisely the aggravating factor considered by the Louisiana legislature in redefining its murder statute to make the killing of a person under the

age of twelve an element of its first degree statute. Louisiana is free to define and punish this conduct one way, and Congress, under Art. I, Sec. 1 of the Constitution, is free to do it another.

Congress is quite capable of redefining common law crimes and adding specific elements to newly enacted legislation based upon age when it deems it appropriate. For example, Public Law 99-646, which repealed the previously defined federal crime of rape at 18 U.S.C. § 2031, abolished the common law crime of rape and redefined the conduct as sexual abuse. That legislation created Chapter 109A of the Federal Criminal Code and within it defined differing crimes, with different elements and punishments, for sexual acts committed within federal jurisdiction. For example, the common law crime of rape is now defined as aggravated criminal sexual abuse at 18 U.S.C. § 2241(a), requires the use of force or threat, and has a statutory penalty of imprisonment for a term of years or life, or both. Such an act with children under the age of twelve is defined at 18 U.S.C. § 2241(c). That section, by contrast, does not require the use of force or threat, but carries the same penalty as section 2241(a). Were Congress so inclined, it, too, could redefine the common law crime of murder to include the elements set forth by Louisiana in its murder statute. So far it has not, and the Assimilative Crimes Act cannot be used to second guess or selectively amend Congress's unique authority under Art. I, Sec. 1 of the Constitution to rewrite a statute because the district court desires to rewrite or redefine the conduct that is regulated and prosecuted in federal court.

II. The Fifth Circuit erred in finding no prejudice to the petitioner, even though the petitioner was sentenced to life imprisonment without parole for a conviction for second degree murder under 18 U.S.C. § 1111.

The Fifth Circuit affirmed the petitioner's conviction and sentence for murder, because it concluded that the petitioner suffered no prejudice as a result of her prosecution under the Assimilative Crimes Act. The controlling factor the Fifth Circuit used was that the life sentence received by the petitioner was no greater than the statutory maximum for second degree murder set forth at 18 U.S.C. § 1111. This ruling was error, and cannot be reconciled with this Court's decisions in *United States v. R.L.C.*, 503 U.S. 291 (1993), and *United States v. Granderson*, 511 U.S. 39 (1994). In both cases, this Court construed "statutory maximum" to be the maximum sentence determined under the Sentencing Guidelines as applied by 18 U.S.C. § 3553(a)(4).

In *R.L.C.*, the issue was "maximum term of imprisonment" under 18 U.S.C. § 5037(c)(1)(B). This Court concluded that "maximum term of imprisonment" should be construed not as the maximum specified in a particular statute, but as the maximum sentence required after application of the Sentencing Guidelines under 18 U.S.C. § 3553(b). 503 U.S. at 294. In the context of *R.L.C.*, that meant that a juvenile could not be detained under 18 U.S.C. § 5037(c)(1)(B) for a period longer than twenty-one months, the maximum authorized under the Sentencing Guidelines, even though the statutory maximum for the corresponding federal offense, involuntary manslaughter, under 18 U.S.C. 1112(b), was three years.

In *Granderson*, this Court held that the proviso, at 18 U.S.C. § 3565(a), requiring imposition of a prison term of one-third the originally applicable sentence after a probation revocation based upon drug use, was limited by the maximum guideline range of six months imprisonment available at the original sentencing, not one third of the probationary sentence of five years. The Court affirmed the decision of the Eleventh Circuit, which had vacated the sentence of twenty months imposed at the probation revocation, one third the sixty-month probationary sentence, and remanded for resentencing to no more than one-third the original maximum guideline of six months.

The Fifth Circuit relied upon pre-Guideline cases in holding that no remand was required for resentencing because "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence the defendant would have received if sentenced under the applicable federal statute." *United States v. Lewis*, 92 F.3d 1371, 1379 (5th Cir. 1996). The determination of the "maximum sentence," however, has changed with the adoption of the Sentencing Reform Act of 1984 (Pub.L. No. § 98-473), which amended 18 U.S.C. § 3553, and created the Sentencing Guidelines. In this case, the maximum sentence the petitioner could receive for second degree murder was 210 months, not life imprisonment.⁴ The sentence imposed, life in prison without parole, corresponds to offense level 43 under the

⁴ The offense level for second degree murder under U.S.S.G. § 2A1.2 is level thirty-three. With an additional two levels under U.S.S.G. § 3A1.1 to reflect the age of the victim, the adjusted offense level becomes level thirty-five. The petitioner has no prior criminal record, placing her in criminal history category I. That produces a sentencing range of 168-210 months in prison.

Sentencing Guidelines, an upward departure of eight offense levels.⁵ Had the petitioner been convicted of federal second degree murder, and received a sentence of life without parole, the sentence imposed would violate 18 U.S.C. § 3553(b), and remand for resentencing would be required under this Court's decision in *Williams v. United States*, 503 U.S. 193 (1993).

In *Williams*, this Court held that where a district court departs from the Guidelines for proper and improper reasons, the sentence imposed must be vacated and remanded for resentencing unless it can be shown that the errors of the district court would not affect the sentence. In this case, the district court imposed a sentence eight levels offense above the applicable sentencing range, and gave no reason except the erroneous one that the petitioner was properly convicted in federal court of murder under a Louisiana statute that required a sentence of life in prison without parole. As previously discussed in the first section of this brief, the prosecution of the petitioner in federal district court under the Assimilative Crimes Act was error, and cannot be a factor for an upward departure. To hold otherwise would

⁵ The minimum sentence for both first (La.Rev.Stat. §14:30C) and second (La.Rev.Stat. §14:30.1) degree murder in Louisiana is "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." A sentence of life in prison under federal law, after the passage of the Sentencing Reform Act of 1984, is also without parole. *United States v. Gonzalez*, 922 F.2d 1044, 1051 (2d Cir. 1990), cert. denied, 502 U.S. 1014 (1991); *United States v. Donley*, 878 F.2d 734, 739-740 (3d Cir. 1989), cert. denied, 494 U.S. 1058 (1990); *United States v. Analla*, 975 F.2d 119, 126-127 (4th Cir. 1992), cert. denied, 507 U.S. 1033 (1993); *United States v. LaFleur*, 971 F.2d 200, 208-209 (9th Cir. 1991), cert. denied, 507 U.S. 924 (1993); *United States v. Sands*, 968 F.2d 1058, 1066 (10th Cir. 1992), cert. denied, 506 U.S. 1056 (1993).

be to permit unauthorized sentences based upon state criminal statutes for conduct already regulated by Congress and governed by the federal Sentencing Guidelines. Not only would this evade the concerns this Court expressed over fifty years ago in *Williams v. United States*, 327 U.S. 711 (1946), but it would also circumvent the underlying purpose of the federal Sentencing Guidelines and the Sentencing Reform Act of 1984 to insure uniformity at sentencing.

The one post-Guideline case relied upon by the Fifth Circuit, *United States v. Hall*, 979 F.2d 320 (3d Cir. 1992), concerned a prosecution under the Assimilative Crimes Act where the sentence imposed was forty-five days and the statutory maximum for the corresponding federal statute was six months. A crime with a maximum sentence of six months or less, however, is a petty offense under 18 U.S.C. § 19, and is not covered by the Sentencing Guidelines under 18 U.S.C. § 3553(b) and 28 U.S.C. § 994(w). This Court's guideline decisions in *Granderson, R.L.C.*, and *Williams*, therefore, would not apply in *Hall*, because in that case there would be no "guideline" maximum by which to determine the statutory maximum. Here, however, there is, and the petitioner's sentence of life imprisonment without parole is clearly in excess of the applicable guideline maximum. That is severe prejudice, and requires that the petitioner's conviction and sentence under the Assimilative Crimes Act for murder under La.Rev.Stat. § 14:30A(5) be vacated. The case should be remanded to the Fifth Circuit with directions that the conviction and sentence imposed under the Assimilative Crimes Act be vacated and this case remanded to the district court for further proceedings with directions that in the event the peti-

tioner is resentenced, she receive a sentence of no more than 210 months in prison.

CONCLUSION

The opinion of the Fifth Circuit, that the petitioner was improperly convicted under the Assimilative Crimes Act, should be affirmed. Her conviction for murder under the Assimilative Crimes Act and the sentence of life in prison without parole should be vacated and this matter remanded to the Fifth Circuit with directions that the case be remanded to the district court for further proceedings.

Respectfully submitted,

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